No. 17-961

IN THE

Supreme Court of the United States

THEODORE H. FRANK and MELISSA ANN HOLYOAK,

Petitioners,

v.

PALOMA GAOS, on behalf of herself and all others similarly situated, et al.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

The decision below perpetuates Ninth Circuit law that, even where it is "possible" to make payments to class members whose injuries have not been compensated, a district court may nonetheless approve a *cy pres* settlement that wipes out their claims and gives them nothing. App. 8–9. Meanwhile, class counsel get paid in full—here, they collected more than double their asserted lodestar fees—based on settlement amounts often propped up with distributions to their own *alma maters* and organizations already being funded by defendants. It is easy to understand why class counsel and the defendant would defend such a settlement—one is handsomely compensated, and the other avoids liability risk at pennies on the dollar. But it is impossible to justify such settlements as "fair, reasonable, and adequate" to class members. Fed. R. Civ. P. 23(e)(2).

Seeking to avoid this Court's review, Respondents mischaracterize that issue as one of fact. But the question presented by this case, on which the courts of appeals are split, addresses when as a matter of law a district court may approve a settlement containing a *cy pres* award. The Ninth Circuit uniquely holds that settlement funds are "non-distributable" to class members, and therefore appropriate for *cy pres* distribution, "where each class member's individual recovery would have been '*de minimis*'"—that is, simply divide the fund amount by the total number of class members and then eyeball the result. App. 8–9. Under

that rule, enterprising class counsel can almost always structure a consumer or privacy class action to result in a fast, lucrative *cy pres* settlement, and almost any class action settlement could divert some amount of funds from class compensation to a *cy pres* award.

By contrast, the Seventh and Eighth Circuits have rejected as a matter of law *cy pres* awards of funds that amounted to, respectively, just pennies and several dollars per class member, holding that *cy pres* is categorically unavailable whenever it is feasible to compensate *at least some* class members. The Fifth Circuit has espoused the very same rule, and the Second and Third Circuits have both vacated settlement approvals when district courts failed to adequately consider whether distributions could be made to class members before authorizing *cy pres* awards. The Ninth Circuit's permissive standard for *cy pres* cannot be squared with these authorities. Respondents dispute it, but that conflict is recognized by practically everyone else to consider the matter.

Respondents fare no better with their attempt to downplay the importance of this issue. The Ninth Circuit's decision pushes the envelope, giving savvy class attorneys an enormous incentive to bring massive class actions with confidence that a *cy pres*-only settlement will be upheld. Even if *cy pres*-only settlements may have slightly waned in recent years—a trend not likely to continue after the decision below—the use of *cy pres* awards in class action settlements

is at an all-time high. Notably, Google itself is defending a *cy pres*-only settlement of a major class action over its use of "cookies" to track web users, relying on the decision below. Given the frequency of *cy pres* awards, this Court's guidance is needed not only to secure a single nationwide standard for what are often nationwide class actions, but to protect absent class members and address the other "fundamental concerns" with *cy pres* identified in the Chief Justice's *Marek v. Lane* opinion. 134 S. Ct. 8, 9 (2013).

This case is the ideal vehicle to do so. Unlike in *Marek*, Petitioners objected at every level to the settlement's *cy pres* award, and Respondents do not contend otherwise. Instead, they simply assert that this settlement, unlike others containing *cy pres* awards, does not commit certain "abuses," but that is both debatable—the *cy pres* recipients include two of class counsel's *alma maters* and four groups already funded by Google—and no defense of the Ninth Circuit's standard that permits class counsel and defendants to divest class members of funds that are rightfully theirs. Respondents identify no defect that would prevent the Court from assessing that standard, and it should do so to provide the guidance and uniformity so urgently needed.

I. The Decision Below Perpetuates a Conflict Among the Lower Courts

The circuits are split on the fundamental question of when it is "fair, reasonable, and adequate" for a class action settlement to award money not to class members but to third parties unconnected to the litigation.

To begin with, and contrary to Respondents' contention, that is a question of law, not fact. *See* Google at 17; Gaos at 18–19. Petitioners do not dispute that it would be infeasible to divide a $5.3 million settlement fund among all 129 million or so class members. At issue, instead, is whether that fact permits approval of a settlement that directs settlement proceeds to *cy pres* recipients instead of class members. The decision below answered that question in the affirmative, holding that settlement funds are "non-distributable," and therefore appropriately devoted to *cy pres*, where a payment to each and every class member would be "*de minimis*." App. 8–9. (discussing and applying *Lane v. Facebook, Inc.*, 696 F.3d 811 (9th Cir. 2012)). In that circumstance, it held, a district need not consider "'possible' alternatives," such as a claims process, that actually compensate class members. App. 9; *see also* App. 10 n.2 (restating rule that there is no requirement to adopt "other distribution methods that might benefit the class more directly").

Respondents insist that there is no circuit split on the legal standard for permitting *cy pres* awards, but cannot even agree on how to wave away conflicting precedent. Google (at 18) says that Seventh Circuit's

decision in *Pearson v. NBTY, Inc.*, 772 F.3d 778 (7th Cir. 2014), is distinguishable because it was possible to pay each class member a couple bucks apiece, while Gaos (at 12) simply observes that *Pearson* contains some general language that has also appeared in Ninth Circuit decisions. Neither, however, grapples with the fact that *Pearson* involved a $1.13 million fund and 12 million class members, such that even a cost-free distribution would entitle each member to less than a dime, 772 F.3d at 780–82—in the same ballpark as in this case and less than the $2 per class member the Ninth Circuit held "non-distributable" in *Lane*. 696 F.3d at 819–21. Nonetheless, because it was possible to compensate at least some class members, such as through an improved claims process, the Seventh Circuit held that doing so was required. 772 F.3d at 784. Of course, that is the very thing—"other distribution methods that might benefit the class more directly"—the decision below held was *not* required. App. 9, 10 n.2.

As for the Eighth Circuit's decision in *In re BankAmerica Corp. Securities Litigation*, 775 F.3d 1060 (8th Cir. 2015), Google (at 19) wrongly suggests the court there rejected a *cy pres* award because the recipient lacked a sufficient nexus to the claims, while Gaos (at 13–14) again finds solace in 10,000-foot statements of law. Neither, however, addresses the Eighth Circuit's holding that a *cy pres* award was not "permissible" because it was possible to compensate at least some class members—those who had previously received and cashed distribution checks. *Id.* at

1064. Again, that is in direct conflict with the decision below.

Both Google (at 19–20) and Gaos (at 14) refuse to take the decision of the Fifth Circuit in *Klier v. Elf Atochem North America, Inc.*, at its word that, because "settlement funds are the property of the class," a *cy pres* award is permissible only "where an additional distribution would provide a windfall to class members with liquidated-damages claims that were 100 percent satisfied by the initial distribution." 658 F.3d 468, 475 (5th Cir. 2011). Nor do they address the court's recognition that, under longstanding Fifth Circuit precedent, "a *cy pres* distribution of unclaimed settlement funds is appropriate only when it is not feasible to distribute those funds to any party to the class action who has a persuasive equitable claim to those funds," including failure to be fully compensated. 658 F.3d 468, 475 n.17 (5th Cir. 2011) (citing *Wilson v. Sw. Airlines, Inc.*, 880 F.2d 807, 811–13 (5th Cir. 1989)). Instead, they focus on the fact that *Klier* involved a court-ordered *cy pres* distribution, but its reasoning is broader than that, with the express exception of its ultimate conclusion regarding a district court's discretion to order *sua sponte* a *cy pres* distribution. *Id.* at 478 n.29 and surrounding text; *see also BankAmerica*, 775 F.3d at 1066 (rejecting such a narrow reading of *Klier*).

Likewise, Respondents refuse to acknowledge the tension between the decision below and *In re Baby Products Antitrust Litigation*, 708 F.3d 163 (3d Cir. 2013), and *Masters v. Wilhelmina Model Agency, Inc.*,

473 F.3d 423 (2d Cir. 2007). Both vacate settlements containing *cy pres* components and remand with instructions to place greater emphasis on direct compensation for class members—a consideration that the decision below regards as secondary at best. *See* App. 10 n.2 (district court need not insist upon "other distribution methods that might benefit the class more directly"). Google (at 20) and Gaos (at 15) focus on the Third Circuit's language in *Baby Products* approving *cy pres* generally, while giving short shrift to the decision's extended discussion emphasizing the primacy of direct benefit to class members, not to mention its ultimate judgment. *E.g.*, 708 F.3d at 173, 178 (stating that "direct distributions to the class are preferred over *cy pres* distributions" and that class counsel's "responsibility [is] to seek an award that adequately prioritizes direct benefit to the class").

Masters likewise emphasized that *cy pres* remains the "*next best*," not first best, use of settlement funds, 473 F.3d at 436 (emphasis in original and quotation marks omitted), and on that basis encouraged the district court to provide class members with up to *treble damages*, as permitted by statute but not provided by the parties' settlement, before directing any funds to *cy pres* recipients, *id.* Neither Google (at 21) nor Gaos (at 15–16) saw fit to address these points.

Finally, if Respondents seriously believe that the lower courts' disparate positions on this issue can somehow be reconciled, then they are in a minority of two. Judges, academics, legal reporters, and practitioners have all reached the opposite conclusion. *See*,

e.g., *Keepseagle v. Perdue*, 856 F.3d 1039, 1069 (D.C. Cir. 2017) (Brown, J., dissenting) (contrasting different circuits' scrutiny of *cy pres* awards); *Graff v. United Collection Bureau, Inc.*, 132 F. Supp. 3d 470, 483–86 (E.D.N.Y. 2016) (discussing different circuits' approaches before declining to approve *cy pres*-only settlement); Robert G. Bone, Justifying Class Action Limits: Parsing the Debates Over Ascertainability and Cy Pres, 65 U. Kan. L. Rev. 913, 942 & n.141 (2017) (recognizing that, "for the past five years, lower courts have sharply disagreed about when and how the remedy should be used," and contrasting *Lane* with *BankAmerica*, among others)); Andrew Rodheim, Class Action Settlements, Cy Pres Awards, and the Erie Doctrine, 111 Nw. U. L. Rev. 1097, 1118–19 (2017) (contrasting Ninth Circuit's approach with other circuits'); Christine P. Bartholomew, Saving Charitable Settlements, 83 Fordham L. Rev. 3241, 3252 (2015) (explaining how, in evaluating proposed *cy pres* awards under Rule 23(e), "judicial interpretation differs, resulting in confusion and inconsistent outcomes"); Jeffrey S. Jacobson, State AGs Still Really Don't Like Cy Pres Class Action Settlements, Ad Law Access Blog (Feb. 12, 2018)[1] (reluctantly acknowledging that the "[c]ircuits are slightly split on what it means to be "feasible"); Gregory A. Markel,

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[1] Available at https://www.adlawaccess.com/2018/02/articles/state-ags-still-really-dont-like-cy-pres-class-action-settlements/

Settling Class Actions: Process and Procedure, Practical Law Practice Note 3-541-8765 (contrasting circuits' different "Approaches to Cy Pres Distributions"); Anthony Anscombe, Cy Pres: 'As Close As Possible' Is Not Good Enough, Law360 Expert Analysis (Oct. 7, 2013)[2] ("Not all circuits permit the use of cy pres in a class action context, and those that do have imposed different restrictions on its use."); James M. Beck, Cy Pres Abuse Poster Child, Drug & Device Law Blog (Sept. 11, 2017)[3] (explaining that the decision below "created a circuit split (unacknowledged), and if the Court takes a look at [this case], it will see the full spectrum of abuse that cy pres awards allow to occur."); Examination of Litigation Abuses: Hearing Before the H. Subcomm. on the Constitution and Civil Justice of the H. Comm. on the Judiciary, 113th Cong. 11 (Mar. 13, 2013) (written testimony of John H. Beisner on behalf of the U.S. Chamber Institute for Legal Reform) (contrasting Ninth Circuit and Third Circuit approaches); U.S. Chamber Institute for Legal Reform, The New Lawsuit Ecosystem 15 (2013)[4] (noting that the Ninth Circuit has "been more accepting of *cy pres* settlements" than others).

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[2] Available at https://www.law360.com/articles/478314/cy-pres-as-close-as-possible-is-not-good-enough.

[3] Available at https://www.druganddevicelawblog.com/2017/09/cy-pres-abuse-poster-child.html.

[4] Available at http://www.instituteforlegalreform.com/uploads/sites/1/The_New_Lawsuit_Ecosystem_pages_web.pdf.

The Court's review is necessary to resolve this well-documented conflict in authority.

II. This Case Is an Ideal Vehicle To Address an Important and Recurring Issue that Raises "Fundamental Concerns"

This case presents an ideal vehicle for the Court to resolve a widely acknowledged circuit split on an issue of overriding importance. Respondents do not dispute that this case properly raises the issue of the appropriate standard for district courts to approve class action settlements containing *cy pres* awards. As such, it would permit the Court, in the course of answering that fundamental question, to address any of the subsidiary concerns with *cy pres* identified by the Chief Justice in *Marek* as "fairly included within the question presented." *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 547 U.S. 47, 56 (2006) (quotation marks omitted). Respondents' extended argumentation (Google at 24–28; Gaos at 19–24) that each and every conceivable "abuse" that could occur in a *cy pres* settlement may not be present in this settlement is beside the point, because that would not prevent the Court from speaking on all relevant issues in the course of enunciating the proper legal standard. Under Respondents' logic, no case would ever be a proper vehicle to address the use of *cy pres*.

Google (at 21–22) seeks to downplay the importance of the issue presented, but refuses to acknowledge that, as its own authority reports, *cy pres* awards in class action settlements are at an all-time high. *See*

Natalie Rodriguez, Era of Mammoth Cases Test Remedy of Last Resort, Law360 (May 2, 2017).[5] Even if *cy pres*-only settlements have declined—and keep in mind that Gaos (at 4) insists that even this one doesn't fit the bill—settlements involving any *cy pres* component equally implicate the fundamental question of when *cy pres* is permissible at all.

And Google doth protest too much, given the many important *cy pres* cases in the pipeline. Google itself is currently defending on appeal a *cy pres*-only settlement over its conduct circumventing users' browser privacy settings so it could better target ads, and it relies in part on the decision below. *In re: Google Inc. Cookie Placement Consumer Privacy Litigation*, No. 17-1480 (3d Cir. filed Mar. 7, 2017). This court recently considered a petition involving a class action settlement over fuel-mismeasurement claims that directed all $22 million of the settlement fund to third parties, including for lobbying. *Speedway LLC v. Wilson*, No. 17-1030 (cert. denied Mar. 19, 2018).[6] *Cy pres* awards are typical in the current wave of data-breach class action settlements, *e.g.*, *In Re Anthem, Inc. Data Breach Litigation*, No. 15-md-02617 (N.D. Cal. filed June 12, 2015), and remain a common feature of false-advertising class action settlements, *e.g.*, Class Action Settlement, *Rikos v. Proctor & Gamble Co.*, No. 11-cv-226, ECF Nos. 166, 167, 169–70 (S.D. Ohio filed Sept.

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[5] Available at https://www.law360.com/in-depth/articles/918296.

[6] Unlike in this case, *Speedway* did not properly present the *cy pres* issue because it had not been raised in the lower courts.

21, 2010) (proposed settlement over probiotic advertising provides for reductions in class compensation to fund *cy pres* awards). The "need to clarify the limits on the use of such remedies," *Marek*, 134 S. Ct. at 9 (Roberts, C.J.), has not at all waned.

Indeed, the Ninth Circuit standard imposes few if any practical limits on *cy pres*. Consider, for example, the $135 million settlement to resolve claims that De Beers injured a class of between 67 and 117 million consumers by abusing its monopoly position in the diamond market. *See Sullivan v. DB Investments, Inc.*, 667 F.3d 273, 290–91 (3d Cir. 2011) (en banc). Deducting fees and expenses leaves just a dollar or two per class member—amounts that the decision below and *Lane* regard as "*de minimis*" and "non-distributable." Under the Ninth Circuit standard, then, the entire fund could go to *cy pres*. The same would be true for almost any large class action. The result is to transform the class action from a device to aggregate class members' claims into a fundraising opportunity for class counsel's favorite charities.

Finally, Google's suggestion (at 24–28) that this case is unsuitable for review because (in its opinion) class members were not really injured by its practices only reinforces the importance of the question presented. If (as Gaos maintains) class members suffered serious injury to their privacy rights under state and federal law, then they should have been compensated, and a settlement that gives them nothing and directs all funds to third parties is not "fair, reasonable, and adequate." But if Google is right, then this case is a

prime example of how the Ninth Circuit's lax approach toward *cy pres* encourages and facilitates strike suits that should never have been brought. After all, without a *cy pres* award to inflate the settlement fund, it would have been impossible to justify paying class counsel over $2 million in fees, and so the case may never have been filed. Either way, the standing of the Petitioners, as class members denied any share of the settlement fund, is unquestionable, and review is warranted.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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